

ENDANGERED SPECIES ACT AMENDMENTS OF 1978

OCTOBER 15 (legislative day, OCTOBER 14), 1978.—Ordered to be printed

Mr. MURPHY of New York, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2899]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2899) to amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine whether exemptions from certain requirements of that act should be granted for such actions, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows: In lieu of the matter proposed to be inserted by the House amendment, insert the following:

That this Act may be cited as the "Endangered Species Act Amendments of 1978".

SEC. 2. Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

(1) by inserting before paragraph (1) thereof the following new paragraph:

"(1) The term 'alternative courses of action' means all alternatives and thus is not limited to original project objectives and agency jurisdiction."

(2) by inserting after paragraph (4) as redesignated by paragraph (7) of this section the following new paragraph:

"(5)(A) The term 'critical habitat' for a threatened or endangered species means—

"(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

"(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

"(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

"(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

(3) by inserting after paragraph (6), as redesignated by paragraph (7) of this section the following new paragraph:

"(7) The term 'Federal agency' means any department, agency, or instrumentality of the United States.";

(4) by inserting after paragraph (10), as redesignated by paragraph (7) of this section, the following new paragraphs:

"(11) The term 'irresolvable conflict' means, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 7(a) of this Act, completion of such action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat.

"(12) The term 'permit or license applicant' means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.";

(5) by striking out paragraph (16), as redesignated by paragraph (7) of this section, and inserting in lieu thereof the following:

"(16) The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.";

(6) by striking out paragraph (18), as redesignated by paragraph (7) of this section, and inserting in lieu thereof the following:

"(18) The term 'State agency' means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State."; and

(7) by redesignating paragraphs (1) through (3) as paragraphs (2) through (4), respectively, by redesignating paragraph (4) as paragraph (6), by redesignating paragraphs (5) through (7) as paragraphs (8) through (10), respectively, and by redesignating paragraphs (8) through (16) as paragraphs (13) through (21) respectively. Sec. 3. Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) is amended to read as follows:

"INTERAGENCY COOPERATION

"SEC. 7. (a) CONSULTATION.—The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation

with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

"(b) SECRETARY'S OPINION.—Consultation under subsection (a) with respect to any agency action shall be concluded within 90 days after the date on which initiated or within such other period of time as is mutually agreeable to the Federal agency and the Secretary. Promptly after the conclusion of consultation, the Secretary shall provide to the Federal agency concerned a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. The Secretary shall suggest those reasonable and prudent alternatives which he believes would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying the critical habitat of such species, and which can be taken by the Federal agency or the permit or license applicant in implementing the agency action.

"(c) BIOLOGICAL ASSESSMENT.—To facilitate compliance with the requirements of subsection (a), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

"(d) LIMITATION ON COMMITMENT OF RESOURCES.—After initiation of consultation required under subsection (a), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would avoid jeopardizing the continued existence of any endangered or threatened species or adversely modifying or destroying the critical habitat of any such species.

"(e)(1) ESTABLISHMENT OF COMMITTEE.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the 'Committee').

"(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a) of this section for the action set forth in such application.

"(3) The Committee shall be composed of seven members as follows:

"(A) The Secretary of Agriculture.

"(B) The Secretary of the Army.

"(C) The Chairman of the Council of Economic Advisers.

"(D) The Administrator of the Environmental Protection Agency.

"(E) The Secretary of the Interior.

"(F) The Administrator of the National Oceanic and Atmospheric Administration.

"(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

"(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

"(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

"(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

"(B) The Secretary of the Interior shall be the Chairman of the Committee.

"(C) The Committee shall meet at the call of the Chairman or five of its members.

"(D) All meetings and records of the Committee shall be open to the public.

"(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a non-reimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

"(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

"(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

"(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

"(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

"(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

"(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

"(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

"(10) Except in the case of a member designated pursuant to paragraph (3)(G) of this subsection, no member shall designate any person to serve as his or her representative unless that person is, at the time of such designation, holding a Federal office the appointment to which is subject to the advice and consent of the United States Senate. In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

"(f) REGULATIONS.—Not later than ninety days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

"(1) a description of the consultation process carried out pursuant to subsection (a) of this section between the head of the Federal agency and the Secretary; and

"(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a) of this section.

"(g) APPLICATION FOR EXEMPTION AND CONSIDERATION BY REVIEW BOARD.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a), the Secretary's opinion under subsection (b) indicates that the agency action may jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify the critical habitat of such species. An application for an exemption shall be considered initially by a review board in the manner provided in this subsection, and shall be considered by the Endangered Species Committee for a final determination under subsection (h) after a report is made by the review board. The applicant for an exemption shall be referred to as the 'exemption applicant' in this section.

"(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

"(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the review board to be established under paragraph (3) and to the Endangered Species Committee for consideration of such application.

"(3)(A) A review board shall be established for purposes of considering an application for exemption and submitting a report to the Endangered Species Committee under this subsection as follows:

"(i) One individual shall be appointed to the board by the Secretary not later than 15 days after an application is submitted pursuant to paragraph (2).

"(ii) One individual shall be appointed to the board by the President, not later than 30 days after an application is submitted pursuant to paragraph (2) and after consideration of any recommendations received pursuant to paragraph (2)(B). An individual appointed by the President under this subparagraph shall be a resident of a State, if any, in which the agency action will be, or is being, carried out.

"(iii) One administrative law judge shall be selected to serve on the board by the Civil Service Commission in the same manner as administrative law judges are selected under section 3344 of title 5 of the United States Code to be detailed to an agency which occasionally or temporarily is insufficiently staffed with administrative law judges. The use by the review board of such an administrative law judge shall be on a reimbursable basis.

"(B) Members of a review board who are full-time officers or employees of the United States shall receive no additional pay on account of their service on the board. All other members shall be entitled to receive an amount not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule for each day during which they are engaged in the actual performance of duties vested in the board. While away from their homes or regular places of business in the performance of services for a review board, members of the board shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

"(4) The Secretary shall submit the application to the review board immediately after its appointment under paragraph (3), and the Secretary shall submit to the review board, in writing, his views and recommendations with respect to the application within 60 days after receiving a copy of any application under paragraph (2).

"(5) It shall be the duty of a review board appointed under paragraph (3) to make a full review of the consultation carried out under subsection (a), and within 60 days after its appointment or within such longer time as is mutually agreed upon between the exemption applicant and the Secretary, to make a determination, by a majority vote, (1) whether an irresolvable conflict exists and (2) whether such exemption applicant has—

"(A) carried out its consultation responsibilities as described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which will avoid

jeopardizing the continued existence of an endangered or threatened species or result in the adverse modification or destruction of a critical habitat;

"(B) conducted any biological assessment required of it by subsection (c); and

"(C) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

Any determination by the review board that an irresolvable conflict does not exist or that the exemption applicant has not met the requirements of subparagraph (A), (B), or (C) shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

"(6) If the review board determines that an irresolvable conflict exists and makes positive determinations under subparagraphs (A), (B), and (C) of paragraph (5), it shall proceed to prepare the report to be submitted under paragraph (7).

"(7) Within 180 days after making the determinations under paragraph (6), the review board shall submit to the Committee a report discussing—

"(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

"(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

"(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee.

"(8) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

"(9) In carrying out its duties under this subsection, a review board may, and any member of a review board if so authorized by the review board, may—

"(A) sit and act at such times and places, take such testimony, and receive such evidence, as the review board deems advisable;

"(B) subject to the Privacy Act of 1974, request of any Federal agency or applicant information necessary to enable it to carry out such duties, and upon such request the head of such Federal agency shall furnish such information to the review board; and

"(C) use the United States mails in the same manner and upon the same conditions as a Federal agency.

"(10) Upon request of a review board, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the review board to assist it in carrying out its duties under this section.

"(11) The Administrator of the General Services, shall provide to a review board, on a reimbursable basis, such administrative support services as the review board may request.

"(12) All meetings and records of review boards shall be open to the public.

"(h) **EXEMPTION.**—(1) The Committee shall make a final determination whether or not to grant an exemption within 90 days of receiving the report of the review board under subsection (g)(7). The Committee shall grant an exemption from the requirements of subsection (a) for an agency action if, by a vote of not less than five of its members voting in person—

"(A) it determines on the record, based on the report of the review board and on such other testimony or evidence as it may receive, that—

"(i) there are no reasonable and prudent alternatives to the agency action;

"(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and

"(iii) the action is of regional or national significance; and

"(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any financial determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

"(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under subsection (h) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action, provided that a biological assessment has been conducted under subsection (c).

"(B) An exemption shall not be permanent under subparagraph (A) if the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of the species. If the Secretary so finds, the Committee shall determine within 30 days after such finding whether to grant an exemption for the agency action notwithstanding the Secretary's finding.

"(i) **REVIEW BY SECRETARY OF STATE.**—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

"(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

"(k) **SPECIAL PROVISIONS.**—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): Provided, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

"(l) **COMMITTEE ORDERS.**—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

"(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

"(m) **NOTICE.**—The sixty-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a) of this section.

"(n) **JUDICIAL REVIEW.**—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the Court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

"(o) **EXCEPTION ON TAKING.**—Notwithstanding sections 4(d) and 9(a) of this Act or any regulations promulgated pursuant to such sections, any action for which an exemption is granted under subsection (h) of this section shall not be considered a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action.

"(p) **EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.**—In any area which has been declared by the President to be a major disaster area under the Disaster Relief Act of 1974, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 401

or 402 of the Disaster Relief Act of 1974, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

"(g) **AUTHORIZATION.**—There is authorized to be appropriated to the Secretary to assist review boards and the Committee in carrying out their functions under subsections (e), (f), (g) and (h) of this section not to exceed \$600,000 for fiscal year 1979, and not to exceed \$300,000 for the period beginning October 1, 1979 and ending March 31, 1980. The Chairman of the Committee shall report to the Congress before the end of fiscal year 1979 with respect to the adequacy of the budget authority contained in this subsection.

SEC. 4. Section 9(b) of the Endangered Species Act (16 U.S.C. 1538) is amended by inserting "(1)" after "(b) SPECIES HELD IN CAPTIVITY OR CONTROLLED ENVIRONMENT." and by adding, the following new paragraph:

"(2)(A) This section shall not apply to—

"(i) any raptor legally held in captivity or in a controlled environment on the effective date of the Endangered Species Act Amendments of 1978; or

"(ii) any progeny of any raptor described in clause (i); until such time as any such raptor or progeny is intentionally returned to a wild state.

"(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary."

SEC. 5. Section 10 of the Endangered Species Act of 1973 (16 U.S.C. 1539) is amended by adding at the end thereof the following new subsections:

"(h) **CERTAIN ANTIQUE ARTICLES.**—(1) Sections 4(d), 9(a), and 9(c) do not apply to any article (other than scrimshaw) which—

"(A) was made before 1830;

"(B) is composed in whole or in part of any endangered species or threatened species listed under section 4;

"(C) has not been repaired or modified with any part of any such species on or after the date of the enactment of this Act; and

"(D) is entered at a port designated under paragraph (3).

"(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirement set forth in paragraph (1)(A), (B), and (C).

"(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

"(4) Any person who imported, after December 27, 1973, and on or before the date of the enactment of the Endangered Species Act Amendments of 1978, any article described in paragraph (1) which—

"(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4;

"(B) was forfeited to the United States before such date of the enactment, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 11; and

"(C) is in the custody of the United States on such date of enactment;

may, before the close of the one year period beginning on such date of enactment, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this Act.

"(i)(1) **TELLICO AND GRAYROCKS PROJECTS.**—Notwithstanding any other provision of this Act, the Committee shall, within 30 days of the date of the enactment of the Endangered Species Act Amendments of 1978, proceed to consider the exemption of the Tellico Dam and Reservoir Project and the Grayrocks Dam and Reservoir Project from the requirements of section 7(a). For the purposes of such consideration, the Committee shall grant an exemption to such projects if the criteria of section 7(h)(1)(A)(i) and 7(h)(1)(A)(ii) are met. A decision on any such exemption shall be made within 90 days after the date of the enactment of the Endangered Species Act Amendments of 1978. If no decision is made within such 90-day period, such project shall be deemed to be exempted from the requirements of section 7(a).

"(2) Following the rendering of a biological opinion by the United States Fish and Wildlife Service concerning the effect, if any, of the operation of the Missouri Basin Power Project on endangered species or their critical habitat, the responsible officers of the Rural Electrification Administration, the Secretary of the Interior, and the Secretary of the Army, shall require such modifications in the operation or design of the Project as they may determine are required to insure that actions authorized, funded, or carried out by them, relating to the Missouri Basin Power Project do not jeopardize the continued existence of such endangered species or result in the destruction or adverse modification of habitat of such species which is or has been determined to be critical by the Secretary of the Interior, after consultation as appropriate with the affected States."

SEC. 6. Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended—

(1) in the first and second sentences of subsection (a)(1) by striking out "or who knowingly commits an act in the course of a commercial activity which violates" each place it appears and inserting in lieu thereof "and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates";

(2) in the third sentence of subsection (a)(1) by striking out "\$1,000" and inserting in lieu thereof "\$500";

(3) in subsection (b)(1) by striking out "willfully commits an act which" each place it appears and inserting in lieu thereof "knowingly";

(4) in subsection (b)(2) by inserting "a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing" after "authorizing";

SEC. 7. Section 11(a) of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding a new paragraph at the end thereof as follows:

"(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species."

SEC. 8. Section 11(b) of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding a new paragraph at the end thereof as follows:

"(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species."

SEC. 9. Section 15 of the Endangered Species Act of 1973 (16 U.S.C. 1542) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 15. Except as authorized in sections 6 and 7 of this Act, there are authorized to be appropriated—

"(1) not to exceed \$25,000,000 for the fiscal year ending September 30, 1977, and the fiscal year September 30, 1978, not to exceed \$23,000,000 for the fiscal year ending September 30, 1979, and not to exceed \$12,500,000 for the period beginning October 1, 1979, and ending March 31, 1980.

"(2) not to exceed \$5,000,000 for the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, not to exceed \$2,500,000 for the fiscal year ending September 30, 1979, not to exceed \$12,500,000 for the period beginning October 1, 1979 and ending March 31, 1980, to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act."

SEC. 10. Section 6(c) of the Endangered Species Act of 1973 (16 U.S.C. 1535(c)) is amended—

(1) by inserting "(1)" after "(c) Cooperative Agreements.—";

(2) by redesignating paragraphs (1) through (5) as subparagraphs (A) through (E), respectively;

(3) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(4) by striking out "subsection" in the matter preceding subparagraph (A) (as so redesignated) and inserting in lieu thereof "paragraph";

(5) by striking out "endangered species or threatened species" in subparagraph (D) (as so redesignated) and inserting in lieu thereof "endangered or threatened species of fish or wildlife";

(6) by striking out "paragraphs (3), (4), and (5) of this subsection" in clause (i) (as so redesignated) and inserting in lieu thereof "subparagraphs (C), (D), and (E) of this paragraph";

(7) by striking out "subparagraph (A) and this subparagraph" in clause (ii) (as so redesignated) and inserting in lieu thereof "clause (i) and this clause"; and

(8) by adding at the end thereof the following new paragraph:

"(2) In furtherance of the purpose of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

"(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

"(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

"(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

"(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or that under the State program—

"(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

"(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species."

SEC. 11. Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended—

(1) by adding at the end of subsection (a)(1) the following new sentence: "At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat."

The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978."

(2) by amending subsection (c)(1) by striking out "and shall", and by inserting immediately before the final period the following: "and specify any critical habitat within such range";

(3) in subsection (c) by inserting at the end thereof the following new paragraph:

"(4) The Secretary shall—

"(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review: and

"(B) determine on the basis of such review whether any such species should—

"(i) be removed from such list;

"(ii) be changed in status from an endangered species to a threatened species; or

"(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b)."

(4) by amending subsection (f)—

(A) in paragraph (2)(A) by striking out "In" and inserting in lieu thereof "Except as provided in subparagraph (B), in";

(B) by inserting after subparagraph (A) of paragraph (2) the following new subparagraph:

"(B) In the case of any regulation proposed by the Secretary to carry out the purposes of this section with respect to the determination and listing of endangered or threatened species and their critical habitats in any State (other than regulations to implement the Convention), the Secretary—

"(i) shall publish general notice of the proposed regulation (including the complete text of the regulation), not less than 60 days before the effective date of the regulation—

"(I) in the Federal Register, and

"(II) if the proposed regulation specifies any critical habitat, in a newspaper of general circulation within or adjacent to such habitat;

"(ii) shall offer for publication in appropriate scientific journals the substance of the Federal Register notice referred to in clause (i)(I);

"(iii) shall give actual notice of the proposed regulation (including the complete text of the regulation), and any environmental assessment or environmental impact statement prepared on the proposed regulation, not less than 60 days before the effective date of the regulation to all general local governments located within or adjacent to the proposed critical habitat, if any; and

"(iv) shall—

"(I) if the proposed regulation does not specify any critical habitat, promptly hold a public meeting on the proposed regulation within or adjacent to the area in which the endangered or threatened species is located, if request therefor is filed with the Secretary by any person within 45 days after the date of publication of general notice under clause (i)(I), and

"(II) if the proposed regulation specifies any critical habitat, promptly hold a public meeting on the proposed regulation within the area in which such habitat is located in each State and, if requested, hold a public hearing in each such State.

If a public meeting or hearing is held on any regulation, the regulation may not take effect before the 60th day after the date on which the meeting or hearing is concluded, and if more than one public meeting or hearing is held, before the 60th day after the date on which the last such meeting or hearing is concluded. Any accidental failure to provide actual notice under clause (ii) to all general local governments required to be given notice shall not invalidate the proposed regulation.";

(C) by redesignating subparagraph (B) of paragraph (2) as subparagraph (C), and by inserting "or (B)" after "Neither subparagraph (A)" in such subparagraph; and

(D) by adding at the end thereof the following new paragraphs:

"(4) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best scientific data available, and the publication in the Federal Register of any such regulation shall, to the maximum extent practicable, be accompanied by a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be impacted by such designation.

"(5) A final regulation adding a species to any list published pursuant to subsection (c) shall be published in the Federal Register not later than two years after the date of publication of notice of the regulation proposing such listing under paragraph (B)(i)(I). If a final regulation is not adopted within such two-year period, the Secretary shall withdraw the proposed regulation and shall publish notice of such withdrawal in the Federal Register not later than 30 days after the end of such period. The Secretary shall not propose a regulation adding to such a list any species for which a proposed regulation has been withdrawn under this paragraph unless he determines that sufficient new information is available to warrant the proposal of a regulation. No proposed regulation for the listing of any species published before the date of the enactment of the Endangered Species Act Amendments of 1978 shall be withdrawn under this paragraph before the end of the one-year period beginning on such date of enactment."; and

(5) by adding at the end thereof the following new subsection:

"(g) **RECOVERY PLANS.**—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.";

(6) in subsection (c)(2)—

A) by striking out "upon" and inserting in lieu thereof "within 90 days of the receipt of";

B) by inserting "and publish in the Federal Register" after "conduct";

C) by inserting "the status of" after "a review of"; and
 D) by inserting at the end thereof the following: "Such review and finding shall be made and published prior to the initiation of any procedures under subsection (b)(1)."

(7) by adding at the end of subsection (b) the following new paragraph:

"(4) In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species."

SEC. 12. That portion of subsection (a) of section 5 of the Endangered Species Act of 1973 (16 U.S.C. 1534) which precedes paragraph (1) is amended to read as follows:

"(a) PROGRAM.—The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—"

SEC. 13. Paragraph (3) of section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended to read as follows:

"(3) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulations."

SEC. 14. Notwithstanding any provision of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or any regulation promulgated or policy established thereunder, the Secretary of the Interior is authorized and directed to release to Doctor Eugene L. Vickery of Lena, Illinois, a narwhale (*Monodon monocerus*) tusk cane contained in a shipment consigned to him that was seized by agents of the United States Fish and Wildlife Service at O'Hare International Airport, Chicago, Illinois, on November 30, 1977. For purposes of section 9 and section 11 of such Act, Doctor Vickery shall be considered not to have violated any provision of such Act with respect to the importation of such narwhale tusk cane.

And the House agree to the same.

JOHN M. MURPHY,
 BOB LEGGETT,
 JOHN D. DINGELL,
 BO GINN,
 DAVID R. BOWEN,
 PHILIP E. RUPPE,
 EDWIN B. FORSYTHE,

Managers on the Part of the House.

JOHN CULVER,
 EDMUND S. MUSKIE,
 MALCOLM WALLOP,
 JOHN H. CHAFEE,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2899) to amend the Endangered Species Act of 1973 to establish an Endangered Species Interagency Committee to review certain actions to determine whether exemptions from certain requirements of that act should be granted for such actions, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

SECTION 1. SHORT TITLE

The short title of the conference report is the "Endangered Species Act Amendments of 1978", which is the short title of both the Senate act and the House amendment.

SECTION 2. DEFINITIONS

The following terms are defined in the conference report:

"Federal agency" is any department, agency, or instrumentality of the United States, the definition contained in both versions of the bill.

"Alternative courses of action" as used in section 3(1) includes all alternatives to an agency action and is not limited to the original objectives of the action or agency jurisdiction.

The conferees adopted a provision contained in both versions which defines "critical habitat" as specific areas *within* the geographical area occupied by the species at the time it is listed that is essential to the species conservation and requires special management consideration.

In addition, the Secretary may designate critical habitat outside the geographical area occupied by the species at the time it is listed if he determines that such areas are essential for the conservation of the species.

The conferees adopted the Senate definition of "irresolvable conflict" which is a set of circumstances under which, after consultation has been concluded, completion of an agency's action would jeopardize the continued existence of a threatened or endangered species or result in the adverse modification or destruction of critical habitat. There is no similar House provision.

S. 2899 redefines the term "species" as it is used in the act. The existing definition of "species" in the act includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of vertebrate "species." The definition included within the conference report would exclude taxonomic categories below subspecies from the definition as well as distinct populations of invertebrates.

The term "State agency" as defined in the House amendment adds to the current definition in the act the State entity responsible for the conservation of plant resources. There is no similar Senate provision.

The conferees did not accept the House definition of "species or habitat degradation" which was defined as placing in jeopardy the continued existence of, or destruction or modification of critical habitat of, an endangered or threatened species. The conferees were concerned that this provision, although merely intended to improve drafting current provision of law, might be interpreted as permitting a lesser standard of protection for threatened and endangered species. There is no similar Senate provision.

The term "permit or license applicant" was accepted from the House bill. When used with respect to an action of a Federal agency for which an exemption is sought under section 7, the term is defined as any person whose application to a Federal agency for a permit or license has been denied primarily because of the application of section 7(a) to an agency action for which an exemption is sought.

SECTION 3. INTERAGENCY COOPERATION

Section 3 combines provisions of both the Senate bill and the House amendment which establishes procedures for Federal agency compliance with section 7 of the act, as well as procedures whereby Federal agencies, the Governor of a State, or an individual seeking a permit or license may seek an exemption from the requirements of section 7.

CONSULTATION

The basic premise of S. 2899 is that the integrity of the interagency consultation process designated under section 7 of the act be preserved.

Many, if not most, conflicts between the Endangered Species Act and Federal actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate. The committee intends that only in those instances where the consultation process has been exhausted and a conflict still exists should the Endangered Species Committee consider granting an exemption for a Federal action.

The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. Conferees did restore a phrase which had been omitted from the Senate language, to clarify that Federal agencies shall consult with the Secretary to ensure that their actions do not adversely impact threatened and endangered species or their critical habitat. The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

The conferees did accept from the House amendments, however, four provisions designed to expedite and improve the consultation process. First, consultation would have to be completed within 90 days or such other time as it is mutually agreeable to the Secretary

and the Federal agency. Second, after the conclusion of consultation the Secretary is required to provide to the Federal agency a written statement detailing whether the agency's actions are in violation of section 7 and outline any reasonable and prudent alternatives to the action.

Third, a biological assessment shall be conducted for the purpose of identifying the presence of any proposed or listed species which might be affected by projects where no contracts for actual construction have been entered into and no construction has begun before the date of enactment of this bill and where the Secretary has advised that such species may be present.

Fourth, after the initiation of consultation, the Federal agency is prohibited from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives to the proposed action.

EXEMPTION PROCEDURE

The conferees adopted from the House an amended version of the provisions creating a review board to screen applications for exemptions from section 7. Under the new section 7, a Federal agency, the Governor of a State where the agency action, species, and critical habitat are located, or an individual seeking a permit or license, may submit to the Secretary an application for an exemption. Such application may be submitted only if the Secretary has issued an opinion stating that the proposed action would not conform with the requirements of section 7(a). The application must be filed within 90 days after completion of consultation and must set forth a statement detailing why the agency action is qualified for an exemption. Upon receipt of the application, the Secretary must promptly notify the Governor or Governors of any affected State(s) and submit the application to the review board.

The review board will consist of three members: one appointed by the Secretary, one appointed by the President after consideration of the recommendations from the Governor(s), of the affected State(s), and an administrative law judge. Within 60 days of receiving the application, the Secretary is to submit to the review board his written views on the matter and his recommendations as to the final disposition of the matter.

Within 60 days after its appointment, or a longer period if agreed to by the Secretary and the agency, the board must determine, by majority vote, whether the agency has (1) consulted with the Secretary in good faith and made a reasonable and responsible effort to consider modifications or alternatives to the proposed action which are consistent with conserving the endangered species (2) has conducted a biological assessment as required in section 7 and (3) has made no irreversible or irretrievable commitment of resources as prohibited under section 7.

If the board makes positive determinations on these three matters, it would proceed to conduct a formal adjudicatory hearing to review the question of the exemption. Within 180 days after making the above determination the board would submit to the committee a report discussing (a) the existence of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits

of the action and of alternative courses of action and (b) a summary of the evidence concerning whether or not the agency action is in the public interest and is of regional or national significance. This provision differs from the House bill in that the board would merely be summarizing testimony and evidence received during the hearings, rather than making recommendations to the committee on compliance with specific criteria. The board would be expected to describe the various options available to the committee.

The record of the review board's proceedings is to be transmitted to the Endangered Species Committee along with the board's report. The review board has the power to request on a nonreimbursable basis the assistance of agency personnel from the head of any Federal agency. The review board should make maximum use of this procedure and should minimize reliance on personnel provided on a reimbursable basis by the GSA. The committee intends the members of the review board to be physically present during the hearing. The committee believes that the presence of the review board during the formal hearing will assist in the development of a sound and comprehensive report to the Endangered Species Committee.

The committee does not intend that either the review board or the Endangered Species Committee should be considered as Federal agencies except as provided for in the bill. The Federal Advisory Committee Act shall not be applicable to either the review boards or the Endangered Species Committee.

Section 7(e) establishes the Endangered Species Committee. The committee is to be composed of seven members: The Secretary of Agriculture; the Secretary of the Army; the Secretary of the Interior; the Administrator of the National Oceanic and Atmospheric Administration; the Chairman of the Council of Economic Advisers; the Administrator of the Environmental Protection Agency; and a person appointed by the President upon recommendation of the Governor or Governors of the affected State or States.

The committee is to meet at the call of its Chairman, the Secretary of the Interior. It has 90 days from the date it receives the review board's report to decide whether or not to grant the agency action an exemption from new subsection 7(a).

An exemption may only be granted by five of the committee's members, voting in person, and after a determination is made on the record. The committee may base its determination on the record developed by the review board, but has the power to itself receive testimony and evidence. The committee does not expect the Endangered Species Committee to conduct a second final adjudicatory hearing. The criteria the committee is to use in making its determination are:

(1) There are no "reasonable and prudent alternatives to the agency action; (2) the benefits of the agency action clearly outweigh the benefits of alternative course of action consistent with conserving the species or its critical habitat, and that such action is in the public interest; and (3) the action is of national or regional significance."

The committee believes that the search for alternatives before the review board and the committee should be significantly larger than during the consultation stage. Section 7 consultation is

intended to focus attention on the agency action, its objectives, and the aspects of the agency action which gave rise to the problem initially. The focus of a section 7 consultation should be on solving the problem in a way which is clearly within the jurisdiction and expertise of the consulting parties.

In contrast, the review board and the Endangered Species Committee should focus on a wider variety of alternatives. Their search should not be limited to original project objectives or the acting agency's jurisdiction. The committee does intend that the review board should only consider alternatives which are both technically capable of being constructed and prudent to implement.

The second criteria considered by the committee involves an evaluation of the benefits of the agency action and an evaluation of the benefits associated with alternatives which would avoid an adverse impact on the species or its habitat.

In the context of this provision, the committee intends that the term "benefits" shall include, but not be limited to, ecological and economic considerations. Among the economic criteria which may be examined and considered by the Endangered Species Committee are those set forth in OMB Circular A-107 and in Executive Order 11949. These include:

- (1) the cost impact on consumers, business markets, Federal, State, and local governments;
- (2) the effect on productivity of wage earners, businesses and government;
- (3) the effect on competition;
- (4) the effect on supplies of important materials, products, and services;
- (5) the effect on employment; and
- (6) the effect on energy supply and demand.

The committee does not intend, however, that the Endangered Species Committee evaluation should be limited to these criteria. They should also consider the national interest, including actions authorized, funded or carried out by the Secretary of Defense; the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant.

The committee notes that the amendment requires the committee to balance the benefits associated with the agency action against the benefits associated with alternative courses of action. They should not balance the benefits of the action against the value associated with the listed species.

To be "in the public interest," an agency action must affect some interest, right or duty of the community at large in a way which they would perceive as positive.

The third finding required before the committee may recommend that an exemption be granted is that the agency action be of "national or regional significance." The term "regional significance" is not intended to refer merely to projects which affect more than one State. Rather, the committee believes that the Endangered Species Committee should evaluate the nature, as well as the scope of the project, in their determination of whether an action is nationally or regionally significant. As an example, the committee believes that an action affecting the Port of Sacramento, in California, would be regionally significant.

If the committee grants an exemption, it must require reasonable mitigation and enhancement measures be taken by the successful applicant. The phrase "reasonable mitigation and enhancement measures" is used in several places in the legislation to describe actions which shall be taken by an applicant which receives an exemption. The required actions must be "reasonable" in their cost, likelihood of protecting the listed species, and the availability of the technology required to make them effective, and other considerations deemed relevant by the Endangered Species Committee. The explanation of the phrase in new section 7 makes it clear that "reasonable mitigation and enhancement measures" are those actions by the applicant which are necessary and appropriate "to minimize the adverse effects of the agency action" on the species or habitat in question. Live propagation, transplantation, and habitat acquisition and improvement are mentioned as specific examples of actions a successful applicant might be required to take.

The committee's final determination is subject to judicial review in the circuit court of appeals for any district where the agency action will be located. This refers to the location of the project where the project will be carried out, and not the district where a permit or license might be issued.

The committee may not grant an exemption if the Secretary of State gives it written certification that the granting of the exemption and the resultant agency action would violate an international treaty or other international obligation of the United States. The certification must be made within 60 days after the committee receives the application for exemption and must be published in the Federal Register. The phrase "other international obligation" should be understood to mean a formal, legal obligation of the U.S. Government. This provision would apply to the Agreement on the Conservation of Polar Bears, signed November 15, 1973; the U.S.-Japan Migratory Bird Convention; as well as the recently ratified U.S.-Russian Migratory Bird Treaty.

When the committee formally issues its order exempting an agency action, any reasonable mitigation and enhancement measures must be spelled out in the document. New section 7(1) makes it clear that such measures are to be carried out and paid for by the party receiving the exemption. In the case of a Federal agency action, the mitigation and enhancement measures required must be authorized by the Congress prior to implementing the action. Such measures would also have to be funded by the Congress concurrently with all other project features. The reasonable mitigation and enhancement measures required must actually be funded and carried out for the exemption to be effective.

The costs of the mitigation and enhancement measures are to be considered project costs for all purposes except for the computation of benefit-cost or other ratios.

Agencies receiving an exemption are required to submit annual reports to the Council on Environmental Quality describing compliance with ordered mitigation and enhancement measures.

The bill adds a new section which would allow the President to grant an exemption for replacement and repairs on public facilities necessary to prevent recurrence of a natural disaster which resulted in a Presidential declaration of a Federal disaster area.

H.R. 14104 adds a new provision which indicates that the granting of an exemption is not a major Federal action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) if an environmental impact statement which discusses impacts on endangered or threatened species or their critical habitats has been prepared on the agency action.

SECTION 4. RAPTORS

During the past 15 years, biologists, conservationists, and falconers have been working to produce raptors through propagation in captivity. In this work an emphasis has been placed on raptors which are now listed as endangered under the authority of the Endangered Species Act. However, prohibitions contained in section 9 of the law against commerce in endangered species have impeded these breeding activities.

S. 2899 amends section 9 of the act to clarify the situation regarding domestic, captive-produced raptors. For the purpose of this amendment, raptor means any bird of prey.

Unless specified in other laws, raptors held prior to the enactment of the act on December 28, 1973 are exempted from the provisions and prohibitions of the act. It is the intent of the committee that the domestic captive-produced progeny of any raptor which was legally held prior to enactment will also be exempt from the provisions and prohibitions of the act, even if such progeny were produced after December 28, 1973.

In order to encourage breeding of raptors in captivity, the domestic captive-produced progeny of raptors considered to be endangered, but legally taken from the wild after December 28, 1973, shall be considered for legal purposes in a like manner as the progeny of raptors captured before 1973. The committee believes this will alleviate some of the human pressures on wild raptor populations, will increase genetic diversity in captive populations, and will further encourage captive production of raptors for conservation, recreation, scientific and breeding purposes.

Further, it is the intent of the committee that where domestic captive bred raptors have been intentionally released and returned to a wild state for conservation and reintroduction purposes, these raptors will be considered to be fully protected under the act. In the case of raptors, the Congress recognizes the worldwide distribution of various species, such as the Peregrine Falcon. These raptors have subtle regional differences, but constitute a single species. This amendment is intended to apply to the raptor species as inclusive of all of its subspecies or regional differences. In order to augment wild populations, the Secretary should encourage the reintroduction of captive bred raptors into the wild. To that end, it is anticipated that the Secretary, on a discretionary basis, may grant permits to qualified individuals and organizational raptor breeders to obtain additional brood stock from the wild populations, provided that offspring of such birds are reintroduced back into the wild in a manner designed to effect a net increase in the overall wild population. The procedures for granting permits and reintroducing birds into the wild shall be in accordance with regulations to be promulgated by the Secretary.

The Secretary may require, by regulation, the owners of all exempted raptors to keep records and require bands or other permanent markings to distinguish them from wild birds. The records and inventories may be inspected by agents of the Secretary at reasonable times. These records, permanent markers and inventory procedures should not unnecessarily duplicate those now required annually under the Migratory Bird Treaty Act for special purpose permits and falconer permits.

SECTION 5. ANTIQUE ARTICLES

Section 5 of S. 2899 amends section 10 of the act by exempting certain antique articles other than scrimshaw from the application of sections 4(d), 9(a), and 9(c) of the act. Such articles are exempted from those sections of the law if they were made before 1830, are composed in whole or part of any listed species, have not been repaired or modified with any part or product of any listed species subsequent to the date of enactment of the act (December 28, 1973), and enter the United States through a port designated by the Secretary of the Treasury.

The date 1830 was chosen on the advice of the Customs Service. Articles produced prior to that time can apparently be readily distinguished by experts from articles made prior to that date. It is expected that the Secretary of the Treasury will see to it that the ports of entry designated under this section will be staffed with customs officers qualified to make such distinctions.

A further protection against abuse found in Section 5 of the bill provides that any person wishing to import such an antique article must submit to customs officers at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary, shall, by regulation require.

The bill extends relief to those who imported such antique articles after the date of enactment of the act (December 28, 1973) and who had such antique confiscated by the Federal Government. Such individuals are given 1 year from the date of enactment of S. 2899 to apply to the Secretary of the Treasury for the return of such articles. The applicant has the burden of proving to the Secretary of the Treasury that the confiscated article satisfies the requirements for entry stated above. Only those items in the custody of the United States as of the date of enactment of S. 2899 are affected by this provision. "Custody" is to include those items on loan to institutions of higher learning, museums or any other party and is not limited to those items in the physical possession of officers of the United States.

TELLICO DAM AND GRAYROCKS RESERVOIR

The most difficult issue faced by the conference committee involved two specific exemptions to the Endangered Species Act for the Tellico Dam in Tennessee and the Grayrocks Dam and Reservoir in Wyoming. These projects posed a unique problem to the committee in that they are two of the three projects in the country that have been enjoined as a result of the Endangered Species Act.

The House-passed bill had provided specific exemptions from the Endangered Species Act for these two projects. In contrast, the Senate bill contained no specific projects exemption, and the Senate had specifically rejected attempts to provide specific exemptions for projects outside of the exemption procedure provided in the bill.

The language adopted by the conference committee is an attempt to address the specific project concerns voiced in the House with the Senate desire to preserve the integrity of the exemption process. Essentially, the provisions contained in the conference report would provide that these two projects are to be considered for exemption within 30 days of enactment by the Endangered Species Committee without the necessity or proceeding through the review board process. Because of the obvious regional significance of both of the projects, it was decided that there was no necessity to require that the committee make such a finding of regional significance. If the Endangered Species Committee, in considering one of these projects, makes the findings that there are no reasonable or prudent alternatives to these projects and the benefits of the project clearly outweigh the benefits of alternative courses of action consistent with conserving the species or critical habitat involved, the committee shall grant an exemption. If no decision is made within 90 days after the date of enactment of this act, these projects would receive an automatic exemption from the requirements of section 7 of the Endangered Species Act.

In addition, the conference committee adopted specific provisions which relate only to the Grayrocks Dam and Reservoir Project. These provisions would first require that the U.S. Fish and Wildlife Service render a biological opinion on the effect of the operation of the Missouri Basin Power project on endangered species or their critical habitat. After the biological opinion is rendered, the responsible officials of the Rural Electrification Administration, the Department of the Interior, and the Department of the Army shall require modification of the design or operation of the project to insure that actions do not jeopardize the continued existence of the species or result in the adverse modification or destruction of its critical habitat. The committee believes that this provision will insure the continued high level of protection for any endangered species involved, particularly the whooping crane.

It is the intent of the committee that if the conflict between the parties in *Nebraska vs. REA* in Federal district court in Nebraska is solved prior to the timetable established therein, the requirements of this provision shall be deemed to have been met. It is not the intent to establish a procedure or requirement under the Endangered Species Act that they otherwise would not have been subject to if the above conflict is resolved.

It is the strong sense of the committee that these are the last instances when any project should receive special consideration in the exemption process. To allow any further aberrations in this process would make meaningless the work of the Congress in fashioning an orderly exemption process and encouraging those agencies that which to evade the strict consultation provisions of this report.

SECTIONS 6, 7, AND 8. PENALTY PROVISIONS

Both the Senate and the House amended section 11 of the act, the penalties and enforcement section in order to alleviate certain enforcement ambiguities of the act. The Conferees accepted the House amendments to section 11; all changes to this section were made after extensive consultation with the Department of Justice.

The amendment reduces the strict liability penalty for others than importers and exporters to \$500, makes criminal violations of the act a general rather than a specific intent crime and subjects importers and exporters of fish and wildlife and plants to strict liability penalties of up to \$10,000.

By deleting from the civil penalty and criminal provisions of section 11 the phrase, "commits an act which violates," the conferees intend only to make it clear that the act's civil and criminal sanctions apply to violations involving the commission of a prohibited act. The conferees do not intend to make knowledge of the law an element of either civil penalty or criminal violations of the act. In furtherance of this intent, the conferees intend that the standard for criminal violations has been reduced from "willfully" to "knowingly".

Under the amendment provided in H.R. 14104, a tourist who unknowingly imports a listed species into the United States could not be fined more than \$500. The conferees assume that in most cases, law enforcement officials will seek the forfeiture of the item rather than impose a civil penalty. The conferees emphasize that the strict liability provision which applies to persons engaged in the business as an importer or exporter of fish, wildlife or plants does not apply to commercial fishing operations which may import fish products into the United States for purposes of human or animal consumption as a part of their business.

SECTION 9. APPROPRIATIONS

Section 9 of S. 2899 authorizes appropriations of \$12,500,000, for the period beginning October 1, 1979, and ending March 31, 1980, to carry out the purposes of this act.

SECTION 10. PLANTS

The conferees adopted a provision contained in both bills which amends section 6(c) of the act to allow the Secretary of the Interior to enter into cooperative agreements with the States for the management and conservation of listed species of plants. This amendment will permit States which develop an adequate and active program for the conservation of listed plants to receive Federal grant-in-aid in the same manner as States now receive funds for resident species of endangered and threatened fish and wildlife.

SECTION 11. NOTIFICATION PROCEDURES

S. 2899 amends section 4(f)(2)(A) of the act to expand present notice requirements and to require public meetings or hearings in connection with the listing of a species and the specification of its critical habitat.

Under the conference report, notice of a proposed regulation (including a complete text of the regulation) would have to be published in the Federal Register 60 days before its effective date. Where critical habitat is specified, such notice must also be published in a newspaper of general circulation within or adjacent to such habitat. Actual notice of the regulation and any environmental assessment or environmental impact statement prepared on it is required to be given to all general local governments within or adjacent to the proposed critical habitat at least 60 days prior to its effective date. This provision does not require actual notice to special districts such as an irrigation or school district. The committee expects that the Secretary would utilize OMB Circular A-95 or some similar device for assuring effective notice to local governments.

Where critical habitat is specified in the proposed regulation, the Secretary must promptly hold a public meeting on the proposed regulation. The meeting must be held in the area in each State where such habitat would be found. The committee intends that the meetings held pursuant to this paragraph be of an informal variety that would permit a colloquy between representatives of the Department and local citizens. If a timely request is filed with the Secretary, a public hearing must be held in the State whose citizen filed the request. It is the intent of the committee that such hearings be held in accordance with appropriate sections of the Administrative Procedures Act and near or within the proposed critical habitat. The committee does not intend that either the meetings or hearings be full adversarial proceedings with all of its inherent expenses to the parties and delays in arriving at a final regulation.

In the rather rare instances where no critical habitat is proposed concurrently with the listing, a public meeting is to be held by the Secretary if a request therefore is filed within 45 days of the publication of general notice.

If, by chance, actual notice is not given to some unit of general local government, such an unintentional and unplanned failure of the notification system shall not invalidate the proposed regulation.

The conference report adds a new paragraph (5) to section 4(f) which would provide that any final regulation adding a species to the list must be published within 2 years after the notice of proposed rulemaking. Any proposed listings not finalized within 2 years must be withdrawn, and cannot again be proposed unless Secretary determines that new information is available which warrants such action. The paragraph provides that any listing which is proposed at the time of the enactment of these amendments would not have to be withdrawn until 1 year after the date of enactment.

The conference report adds a new subsection (g) to section 4 which would require the Secretary to develop and implement recovery plans for listed species. Such plans would be designed to ensure the conservation or survival of each listed species. Recovery teams may be appointed by the Secretary, where appropriate, to aid in developing or implementing a recovery plan for a particular species. Such plans shall be as long and as detailed as is necessary and consonant with their purpose of providing a frame work for actions directed at conserving or, at least, insuring the survival of the subject species. Although recovery plans are implicit in the Endangered Species Act, the act does not specifically mandate recovery plans. As a result, recovery plans have been given a low priority within the Endangered Species Act budget.

The committee intends the Secretary to establish recovery teams to assist with: (1) the development of plans; (2) periodic amendment of plans; and (3) the implementation of the plans. The committee hopes that the Secretary will appoint full-time professionals to insure that planning and implementation proceed expeditiously.

SECTION 12. FOREST SERVICE AUTHORITY

The conference agreed to language of the House version which provides the Secretary and the Secretary of Agriculture with the authority to acquire land for the conservation of listed species including plants. The current act limits this authority to the Secretary of the Interior.

SECTION 13. PUBLICATION IN THE FEDERAL REGISTER

The Conferees adopted a provision of the House bill which amends paragraph 4(f)(3), which requires the Secretary to include with any proposed or final regulation published in the Federal Register a summary of the data on which the regulation is based.

JOHN M. MURPHY,
BOB LEGGETT,
JOHN D. DINGELL,
BO GINN,
DAVID R. BOWEN,
PHILIP E. RUPPE,
EDWIN B. FORSYTHE,

Managers on the Part of the House.

JOHN CULVER,
EDMUND S. MUSKIE,
MALCOLM WALLOP,
JOHN H. CHAFEE,

Managers on the Part of the Senate.